IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Simon Balderas, et al., v. State of Texas, et al.,	No. 6:01CV158
J.B. Mayfield, et al., v. State of Texas, et al.,	No. 6:01CV218
Brian Manley, v. State of Texas, et al.	No. 6:01CV231

This Filing Applies To: All Actions

MOTION TO PROHIBIT MODIFICATION OR TERMINATION OF INJUNCTION

Pursuant to Federal Rule of Civil Procedure 60(b), Plaintiffs Mayfield, Stanley, Cottle, Lee, and Woods ("the Mayfield Plaintiffs") respectfully move this Court for an order (1) prohibiting the Defendants from implementing Plan 1374C, the congressional redistricting plan passed by the Texas Legislature on October 12, 2003 (House Bill No. 3, 78th Legislature, 3rd Called Session, 2003), unless and until they have sought and won an order from this Court lifting its 2001 injunction requiring use of Plan 1151C, and (2) establishing an orderly process for consideration of such a modification request.

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In support of that motion, we make four basic points. *First*, there is an injunction currently in place requiring use of the 2001 Court-drawn map (Plan 1151C), and Defendants would have to seek relief under Federal Rule of Civil Procedure 60(b) to implement the new plan. *Second*, in assessing such a motion, the Court would be called upon not only to determine the legality of the new map but also to weigh equitable considerations in which the public interest plays a significant role. In particular, Defendants should be required to show some public benefit produced by use of the proposed Plan 1374C that outweighs the disruption caused by using a radically new districting plan for the third election in a row, especially if there is some chance that legal developments will require yet another map before 2006. Proposed Plan 1374C would be particularly disruptive, as it moves more than 8.1 million Texans into new districts. Moreover, as the State has now conceded, Plan 1374C can only be implemented by moving the primary elections – including the presidential primary – from March 2, 2004 ("Super Tuesday"), back to March 9, by which time the Democratic presidential nomination contest will likely have been resolved by primaries held in other States (including California and New York). *Third*, there are very strong arguments that the new map violates federal law – arguments that would be impossible to resolve without a full evidentiary hearing. *Fourth*, the Court has been presented with this complex set of questions only weeks before the commencement of the electoral process for 2004, leaving little time for appropriate consideration.

For these reasons, the Mayfield Plaintiffs respectfully suggest that the Court leave the current map in place for the 2004 election cycle and adopt a schedule allowing for orderly consideration of the possibility of putting the Legislature's new map into effect

thereafter. Alternatively, it will be necessary to litigate the relevant issues on a very expedited basis. Under no circumstances, we submit, should the Court allow the new map to take effect without a prior determination that it is lawful and that the balance of relevant equitable considerations justifies a new map at this point in the decade.

STATEMENT OF FACTS

The Texas Constitution provides that the Legislature "shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." Tex. Const. art. III, § 28. Although the Texas Constitution does not expressly address congressional districts, the Legislature's consistent practice has been to handle congressional redistricting in a similar manner. In the 77th Legislature's regular session, running from January to May 2001, however, the Legislature could not reach agreement on a new congressional plan, and Governor Rick Perry opted not to call a special session.

On November 14, 2001, this three-judge Court, based on findings that the 30 existing congressional districts in Texas were unconstitutional, and based upon the continuing "failure of the State to produce a congressional redistricting plan," imposed on the State of Texas a new 32-district congressional map. *Balderas v. Texas*, Civil No. 6:01-CV-158, slip op. at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court) (*per curiam*), *attached as* Exh. A, *summarily aff'd*, 536 U.S. 919 (2002). This Court rendered a final judgment "declaring that the existing congressional districts in the State of Texas are unconstitutionally malapportioned and adopting Plan 1151C as the remedial congressional redistricting plan for the State of Texas." Final Judgment, *Balderas v.*

Texas, Civil No. 6:01-CV-158, at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court), *attached as* Exh. B.

Neither the State of Texas nor any other Defendant appealed the Court's decision. Rather, only the Balderas Plaintiffs appealed. On appeal, the State of Texas filed a motion asking the United States Supreme Court to affirm this Court's judgment. The Supreme Court summarily affirmed on June 17, 2002. 536 U.S. 919 (2002). The Court-drawn Plan 1151C governed the 2002 elections.

Although Plan 1151C created several potentially very competitive districts, based on recent statewide elections (for President, U.S. Senator, Governor, Lieutenant Governor, and so on) it appeared that 20 districts leaned at least somewhat Republican and 12 leaned at least somewhat Democratic. But the November 2002 general elections generated a congressional delegation with 15 Republicans and 17 Democrats. The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts reelected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party). Seven of the incumbents – six Democrats and one Republican – prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. In other words, seven current Members of Congress won because they attracted split-ticket voters; without that support, each would have lost to a challenger from the district's dominant political party. Those seven Congressmen (six of whom represent relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Because six of the seven incumbents who won these relatively tight contests were Democrats, Democrats won more of the State's 32

seats and Republicans won fewer seats than the current statewide balance of power alone would have suggested.

At the same time that Republicans were picking up two new congressional seats, they also were making gains at the state-legislative level. As a result, Republicans won a majority of seats in the Texas House of Representatives and, with it, unified control of the state government for the first time since Reconstruction.

Proceedings in the Texas Legislature in 2003 to Enact a New Congressional Plan

In 2003, the newly elected 78th Legislature convened in regular session. The Texas House began considering congressional redistricting and its Redistricting Committee ultimately passed a plan and sent it to the full House for consideration. According to press reports at the time, the unprecedented push for mid-decade congressional redistricting was driven by Texas Congressman and Majority Leader Tom DeLay, who had flown to Austin to kick off the effort. Congressman DeLay stated publicly: "I'm the Majority Leader, and we want more seats." Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, Associated Press, May 7, 2003. During the 2003 regular session, as a critical deadline approached for passing legislation in the Texas House, a group of Democratic House Members left the State and broke quorum for a week, setting off a frenzied reaction.

Governor Perry and the Speaker of the Texas House of Representatives Tom Craddick (both Defendants in this case) asked state law-enforcement officials to physically compel the Democrats to return. Texas Department of Public Safety (DPS) troopers were sent to a neo-natal unit to try to "nab" one legislator who might be visiting his prematurely born twins. *See* April Castro, *Troopers Sent to Find Lawmakers Who*

Skipped Session, Associated Press, May 13, 2003. Congressman DeLay's office attempted to enlist federal assistance from the Department of Homeland Security, the Department of Transportation, and the Department of Justice to locate and apprehend the Democrats.[1] None of these tactics succeeded in regaining a quorum. Consequently, the legislative deadline passed without action by the Texas House, effectively killing the congressional redistricting measure for the regular session.

During the 2003 regular session, the Chair of the House Committee on Redistricting, Representative Joe Crabb, asked Texas Attorney General Greg Abbott if the Texas Legislature had a mandated responsibility to perform congressional redistricting in 2003. On April 23, 2003, the Texas Attorney General issued his opinion, stating that the Legislature was not mandated to act nor could it be compelled to do so. The Attorney General's opinion also stated that the congressional plan drawn by the three-judge Court in the *Balderas* litigation was a valid map that could govern congressional elections for the entire decade: "Unless and until the Legislature adopts [a new] plan, the map drawn in 2002 [*sic*] by the three-judge court in *Balderas v. Texas* will continue to be the congressional redistricting plan for Texas." Op. Tex. Att'y Gen. No. GA-0063, at 5 (Apr. 23, 2003), *available at* http://www.oag.state.tx.us/opinopen/opinions/op50abbott/ga-0063.htm.

Governor Perry announced shortly after the 2003 regular session ended that he was calling the Texas Legislature into special session to take up congressional

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[1] *See* Office of the Inspector General, U.S. Dep't of Justice, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, at 4-6 (Aug. 12, 2003), *available at* http://www.usdoj.gov/oig/special/03-08a/final.pdf; Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dep't of Transportation, *Federal Aviation Administration Efforts to Locate Aircraft N711RD* (July 15, 2003) (testimony to House Comm. on Transp. and Infrastructure), *available at* http://www.oig.dot.gov/show_pdf.php?id=1127; Office of Inspector General, U.S. Department of Homeland Security, *Report of Investigation IN03-OIG-0662-S*, at 1, *available at* http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

redistricting. This marked the first time in history that the Texas Legislature would be convened for the purpose of enacting a new congressional plan to replace a legally valid map.

Just prior to the start of the special session, the Texas House, which had voted not to hold public field hearings on congressional redistricting during the regular session, reversed itself and decided to hold hearings across the State. The Texas Senate also scheduled a series of field hearings. At these public hearings, more than 5,000 Texas voters appeared and gave their views on the propriety of mid-decade congressional redistricting. More than 90% of them opposed the Texas Legislature's taking up the issue. Among these opponents was Rice University political science professor John Alford, who had testified for the state Defendants in the *Balderas* trial in October 2001. Every major newspaper in the State editorialized against the mid-decade "re-redistricting," and all told more than 130 such editorials were published.

During the first special session, despite widespread public opposition, the House quickly passed a new congressional map. The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. On July 23, 2003, the Senate Committee voted along party lines to approve a new plan, with all three Democrats voting against the measure and all four Republicans voting in favor.

However, in the full Texas Senate, the attempt to enact a new congressional map failed in the first special session when eleven state senators (more than a third of the Texas Senate) announced that they were opposed to taking up congressional redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider

it. With one exception, the Texas Senate has used this practice or procedure, known as the "two-thirds rule," each time it has convened in the last thirty years to enact a congressional redistricting plan. Because more than a third of the senators announced they were opposed to congressional redistricting legislation being considered, the measure died in the first special session.

Defendant Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting. *See* Ken Herman, *Dewhurst: Redistricting Dead This Session*, Austin Am.-Statesman, July 25, 2003. The decision to abandon the two-thirds rule would apply only to congressional redistricting legislation considered in any second special session, Dewhurst said. *See id.* When information surfaced that the Texas Senate would adjourn *sine die* on June 29, 2003, and would convene a second special session five minutes later, eleven Texas senators left the State to deprive the Senate of a quorum. Although lacking a quorum, the Republican Senators voted to fine their Democratic colleagues up to $5,000 per day and to revoke privileges for their staffs. Among other penalties, they also forbid absent legislators from obtaining flags that have flown over the Capitol to give to bereaved constituents. *See* Gromer Jeffers, Jr., *Runaway Democrats Expand Lawsuit; Dewhurst Aide Says Maneuver an Attempt to Stall Redistricting*, Dallas Morning News, Aug. 21, 2003.

The eleven senators stayed out of State for a month. But as the second special session ended, one of the absent senators announced that he would return to the State. The remaining ten, unable to prevent a quorum, announced that they too would return.

On September 9, 2003, Governor Perry called a third special session. The Legislature enacted a new congressional map, Plan 1374C, on October 12, 2003, on a near-perfect party-line vote. Every Hispanic and African-American Senator and all but two of the minority Representatives voted against Plan 1374C. (The Texas Legislative Council's (TLC's) maps and statistical package for Plan 1374C are attached as Exhibits C and D, respectively. An interactive map is available on the TLC's Web site at http://www.tlc.state.tx.us/research/redist/redist.htm.)

The new plan was designed to produce one likely outcome: the defeat of at least seven incumbent Democratic Members of Congress. Based on 2002 statewide election returns, of the 32 districts in the plan, 22 would be safely Republican while the other 10 would be packed with Democratic voters. Dallas and Tarrant Counties, for example, would contain parts of eight districts, seven of which lean strongly Republican. And throughout the State, district lines would be adjusted to assure that the six Democrats elected primarily from rural Republican-leaning districts would no longer represent their long-time constituents and thus would have little chance of winning reelection.

ARGUMENT

The State's enactment of a new congressional districting plan does not end the mandatory injunction that this Court imposed in 2001 when it ordered the Defendants to conduct future elections under Plan 1151C. That judgment remains outstanding, and the State is duty-bound to abide by it. The Court should not vacate the injunction and allow the new map to take effect because (1) the balance of equities plainly favors avoiding the harm to the public interest that would be caused by the proposed change in district lines,

(2) the State lacks constitutional authority to perform mid-decade congressional redistricting, and (3) the map itself violates federal law.

I. The Current Congressional Redistricting Plan Is a Fair Map Imposed by the Three-Judge Court to Remedy the State of Texas's Unconstitutional Conduct.

The State of Texas remains under a continuing injunction imposed by this Court to implement the current congressional plan. This Court's November 2001 decision was a remedial order: "[T]he court renders judgment declaring that the existing congressional districts in the State of Texas are unconstitutionally malapportioned and adopting Plan 1151C as the remedial congressional redistricting plan for the State of Texas." Final Judgment, Nov. 14, 2001, at 1. This Court did not direct the Legislature to enact a new map; nor did it impose the map unless and until the plan was replaced by the State of Texas. The redistricting plan ordered into effect by this Court remains in full force and effect unless and until the Court modifies its prior order.

Thus, before implementing the new plan, the State would have to file a motion here under Rule 60(b), demonstrating why changed circumstances justify modifying or vacating the final remedy this Court imposed two years ago. Rule 60(b) provides in part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . (5) . . . [when] it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5), (6). In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Supreme Court clarified the two-step analysis that district courts

should apply when confronted with a Rule 60(b) motion for modification of an injunction that relates to the vindication of a constitutional right. *See id.* at 378, 383 n.7.[2]

First, the party seeking modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* at 383. Under this first step, modification "may be warranted when changed factual conditions make compliance with the decree substantially more onerous, . . . when a decree proves to be unworkable because of unforeseen obstacles, . . . or when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384 (citations omitted). *Second*, "[i]f the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 383. A proposed modification is not suitably tailored if it either creates "a [new] constitutional violation" or "strive[s] to rewrite a . . . decree so that it conforms to the constitutional floor." *Id.* at 391.

Of particular relevance to this case is the *Rufo* Court's discussion of the role of federalism when state officers seek to modify an injunction under Rule 60(b). At the first step – when determining whether a significant change in circumstances warrants revision of the injunction – the district court should evaluate the public interest while according "[n]o deference" to the defendant state officials. *Id* at 392 n.14. "[P]rinciples of federalism" enter the analysis only at the second stage of the inquiry, when determining whether the proposed modification is suitably tailored to the changed circumstance, "to resolve the intricacies of implementing a decree modification." *Id.* at 392 & n.14.

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[2] "Decrees entered after litigation and those entered by consent are treated in the same fashion on a motion to modify or vacate." 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 2961, at 393 (2d ed. 1995) (citing cases).

Here, the Defendants cannot possibly claim that compliance with this Court's November 14, 2001 final judgment has become "substantially more onerous" or has proven "to be unworkable because of unforeseen obstacles"; and, as we will show *infra* in Point II, they cannot credibly argue that enforcement of the Court's final judgment without modification would be "detrimental to the public interest." Moreover, even if Defendants could surmount this hurdle by proving that revision of the Court's judgment somehow served the public interest, this Court would have to reject their specific request for modification because, as we will show *infra* in Point III, the proposed Plan 1374C would create new violations of the Federal Constitution, as well as the Voting Rights Act.

II. In Deciding Whether to Allow a Modification, the Court Would Be Required to Exercise its Equitable Discretion and Protect the Public Interest.

In administering an equitable decree arising from prior unconstitutional conduct, the Court must exercise its discretion and decide whether maintaining the current injunction or changing it would better serve the public interest. *See Rufo*, 502 U.S. at 378-93. There is no right to have an injunction vacated based simply on the fact that the defendant has later taken other steps to avoid being a constitutional violator. The defendant has the burden of showing an affirmative reason for changing course. *See id.*; Fed. R. Civ. P. 60(b).

Here, a major factor to consider is that the State now proposes to utilize the *third* congressional districting plan in Texas in as many elections. Plan 1000C from the 1990s was used in the 2000 elections; this Court's Plan 1151C was used in the 2002 elections; and Defendants would have us use Plan 1374C in the 2004 elections. Such changes severely disrupt voters' relationships with their Representatives. That is especially true of Plan 1374C, which would move more than 8.1 million Texans into new districts where

they would be deprived of the opportunity to vote for incumbents who have served them well and against incumbents who have served them poorly.[3] *See White v. Weiser*, 412 U.S. 783, 791, 797 (1973) (applauding a State's good-faith efforts, when redistricting, to "maintain[] existing relationships between incumbent congressmen and their constituents"), *cited favorably in Bush v. Vera*, 517 U.S. 952, 964-65 (1996) (plurality opinion) (holding that maintaining relationships between Members of Congress and their constituents is a "legitimate state goal" and a "traditional [redistricting] principle" in Texas).

That concern is even more serious where, as here, the law is uncertain and allowing the new plan to take effect this year might well lead to imposition of a *fourth* map for 2006. As we describe below, currently pending in the U.S. Supreme Court (and scheduled for oral argument on December 10, 2003) is a case – *Vieth v. Jubelirer* (No. 02-1580) – that may substantially alter the standards governing the constitutionality of political gerrymandering. The issue of political gerrymandering is hardly an insignificant one here, given the starkly partisan nature of the recent legislative process and the resulting map. But the Supreme Court's resolution will not be known until sometime in the first half of next year, which could be too late for enforcement of the *Vieth v. Jubelirer* ruling for the 2004 elections in Texas, with its early filing deadlines and primary. So if this Court were to let the new map take effect now, there is good reason to expect yet another new map in two years.

Sometimes, of course, such changes are required because the existing map is found to be illegal in some way. *See Bush v. Vera*, 517 U.S. 952 (1996). But here, the

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[3] By contrast, this Court's map, Plan 1151C, managed to keep 78% of all Texans in the same district as their incumbent Members of Congress, even as the number of districts increased from 30 to 32.

State is proposing to replace a map that is perfectly legal and was deliberately drawn by this Court in a manner calculated to serve the public interest. The Court stated in its 2001 opinion that it was following the same process of drawing districts used by Professor John Alford, the State's expert witness. That process was grounded in "principles of district line-drawing that stand politically neutral." *Balderas*, slip op. at 5. Moreover, the Court "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races." *Id.* at 9. The Court found that its plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Id.*

As predicted, under the Court's Plan 1151C the successful Republican candidates for Governor and for U.S. Senator each carried 20 districts in November 2002, while their Democratic opponents carried 12. But at the same time, Texans elected 15 Republicans and 17 Democrats to the U.S. House of Representatives. That was not because the Court's plan contains 15 "Republican districts" and 17 "Democratic districts." To the contrary, the current plan contains more Republican-leaning districts than it does Democratic-leaning districts. But in November 2002, there were more Democratic congressional candidates who succeeded in attracting independent and ticket-splitting voters. Specifically, there were six Democratic Members of Congress who won Republican-leaning districts and one Republican Member of Congress who won a Democratic-leaning district. The Republican candidate who successfully "swam upstream" was Congressman Henry Bonilla in District 23. That district voted for the

Democratic candidate in 14 of the 16 statewide elections in November 2002. But it also voted for Republican Congressman Bonilla.

Conversely, there were six Democratic Congressmen who ran successfully in Republican-leaning districts, largely because of their long-standing relationships with the voters in their home areas. Because of that familiarity, these candidates were able to build support among independent and ticket-splitting voters, to add to a critical base of minority voters. In District 1 (Congressman Max Sandlin), District 4 (Congressman Ralph Hall), District 11 (Congressman Chet Edwards), and District 17 (Congressman Charlie Stenholm), the Democratic congressional incumbent prevailed even though all 16 of the statewide Republican candidates carried each of these districts. Similarly, Congressman Jim Turner won in District 2 while 15 of the 16 statewide Republican candidates were carrying his district, and Congressman Nick Lampson won in District 9, where 13 of the statewide Republican candidates prevailed. So under the Court-ordered Plan 1151C, 14 districts voted consistently Republican, 11 voted consistently Democratic, and 7 generated "split" results, generally supporting statewide candidates of one party but congressional candidates of the other party. Absent these "split-ticket" districts, the partisan composition of Texas's congressional delegation would be foreordained by the map, and Texas's centrist and independent voters would be disempowered.

The State of Texas's decision to modify the current map is not based on any particular hardship or illegality in the current plan. In fact, the current map was drawn by this Court and upheld as lawful by the Supreme Court. Those who pushed to enact a new plan in 2003, from defendant Tom DeLay to the defendant Governor and Lieutenant

Governor, to those who sponsored the congressional redistricting bills in the Texas Senate and House, openly stated that their purpose was partisan maximization. They accordingly drew a map with 22 strongly Republican districts – 21 of which are more Republican than the State as a whole and thus unlikely to elect a Democrat to Congress *even if the Democrats were to win a majority of the votes statewide.*[4] To achieve that goal, the map not only disrupts voters' long-standing relationships with their Representatives but also disregards other traditional and neutral redistricting principles. Where this Court "struggled to follow local political boundaries," *Balderas*, slip op. at 7, and achieve "compactness," *id.* at 8, the new map would *increase* county splits and *decrease* compactness.[5] For example, new District 25 would consist of a narrow string of rural counties uniting Hispanic population in East Austin with Hispanics living along the Mexican border.

Furthermore, any attempt to implement Plan 1374C for the 2004 elections would raise complex timing problems under federal and state election law. For example, under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the state Defendants cannot administer Plan 1374C until it has been "precleared" by the Attorney General of the United States or by the U.S. District Court for the District of Columbia. *Id.* The

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[4] The other district is Congressman Bonilla's proposed District 23, which has been made much more Anglo and Republican, so that its voting patterns now approximately match the State as a whole.

[5] Using the sum of the two compactness measures that the Texas Legislative Council (TLC) calculates, 25 of the districts in proposed Plan 1374C are less compact than the average district in the Court-drawn Plan 1151C. Indeed, using the "Smallest Circle" measure, three districts (Districts 25, 15, and 26) in Plan 1374C score worse than *any* of Plan 1151C's districts.

Proposed Plan 1374C would split 28 counties into 71 pieces, as compared with 23 counties being split into only 60 pieces under the Court-drawn Plan 1151C. In drawing Plan 1151C, this Court also was careful to avoid any instances of "double splits" – defined as "simultaneously moving populations in and out of a county between two districts." *Balderas*, slip op. at 7-8. But Plan 1374C double-splits Fort Bend and Harris Counties (with Districts 9 and 22), double-splits Brazoria, Fort Bend, and Galveston Counties (with Districts 14 and 22), double-splits Cameron and San Patricio Counties (with Districts 15 and 27), double-splits Bexar, Comal, and Hays Counties (with Districts 21 and 28), double-splits Bexar and Webb Counties (with Districts 23 and 28), and double-splits Dallas, Denton, and Tarrant Counties (with Districts 24 and 26). All told, Plan 1374C double-splits 13 counties, as compared with zero in Plan 1151C

Attorney General has at least 60 days to conduct an administrative preclearance. *Id.* Under *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex.) (three-judge court), *summarily aff'd sub nom. Richards v. Terrazas*, 505 U.S. 1214 (1992), the State of Texas cannot submit a redistricting plan to the Justice Department for preclearance until the plan has become effective as law. *Id.* at 843. Because House Bill 3, setting forth Plan 1374C, did not receive a two-thirds majority vote in each chamber of the Texas Legislature, it cannot take effect until the 91st day after the last day of the special session – in January 2004. *See* Tex. Const. art. III, § 39; *see also Terrazas v. Slagle*, 789 F. Supp. at 839-45 (relying on this state-constitutional provision, refusing to allow the State of Texas to implement a legislatively enacted senate redistricting plan, and forcing the State instead to use a court-drawn map for the 1992 elections). Therefore, it may be impossible to preclear Plan 1374C in time for it to be used in the 2004 primary elections consistent with the calendar dictated by the Texas Election Code.

Furthermore, at this point, Plan 1374C can be implemented in the 2004 elections only by wreaking havoc on Texas's 2004 election schedule. In conjunction with House Bill 3, which contains Plan 1374C, the Texas Legislature has also enacted House Bill 1, which moves the date of primary elections in Texas from March 2, 2004, to March 9, 2004, and correspondingly shifts the dates for candidates to qualify for the primary ballot. By enacting House Bill 1, the State has admitted the impossibility of holding elections under the normal schedule using Plan 1374C. Thus, the State has given this Court a choice between normally scheduled elections under the Court-drawn Plan 1151C or rescheduled, delayed elections under Plan 1374C. The latter option will disadvantage the public in several ways. First, just this year, the Texas Legislature moved the primary date

to March 2 to maximize Texas's role in the presidential primary process.[6] If the Court were to permit Plan 1151C (the current Court-ordered map) to be used in 2004, the primary election would not have to be moved for the second time in less than a year because the current Court-approved map is perfectly capable of timely implementation in 2004. Second, because the primary date in Texas was scheduled for March 2 ("Super Tuesday"), delaying the date of the primary is certain to work a disadvantage to Texas's clout vis-a-vis other States (*e.g.*, California and New York) holding presidential primaries on that same day, and will basically take Texas out of any meaningful role in the Democratic presidential primary process. Third, moving the primary particularly disadvantages Texas Democrats (but not Texas Republicans) who will have a hotly contested and wide-open presidential primary in 2004. Fourth, because most minority voters in Texas identify with the Democratic Party, they will be particularly disempowered by moving the primary and thus will be more harmed than Anglo voters if the Court permits the State's newly enacted Plan 1374C to be used in 2004 and the primary election date is changed.

The State's chief response to all of this will likely be that principles of federalism demand implementation of the Texas Legislature's enacted plan, regardless of its impact on the public interest. As already explained above, that position is contrary to the standard that the Supreme Court enunciated in *Rufo*. *See Rufo*, 502 U.S. at 392 & n.14. But even if federalism interests were relevant at this stage of the Rule 60(b) inquiry, and even assuming the new map were not flatly illegal, *but see infra* Point III, the equitable

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[6] "Rep. Dan Branch, R-Dallas, . . . led the push to move the state's primary date, historically held during spring break, to the first week in March. . . . He said moving the primary date to the first week in March was designed to avoid spring break, get more people to vote, and make Texas a player in the Democratic presidential primaries " Gromer Jeffers, Jr., *Hopes for Early Primary Fade*, Dallas Morning News, Oct. 7, 2003.

balance would turn on whether federalism concerns that favor a legislatively enacted map over a court-drawn map outweigh all of the negative effects on the public interest caused by the new map – including the unnecessary disruption of constituent relationships through imposition of a third new map in six years as well as the disregard of traditional districting principles and the effective imposition of Republican hegemony regardless of how Texas voters actually vote. Here, given the nature of the legislative process and product, as well as the last-minute timing of the Legislature's action, we submit that Defendants are in no position to insist on acceptance of their new map as an alternative to the constitutional remedy the Court had to put in place in 2001.[7]

III. The Proposed Map Violates Federal Law.

At a minimum, before allowing the new proposed map to take effect, the Court must review its legality. For several reasons, the proposed Plan 1374C, unlike the map drawn by this Court, violates federal law.

A. Mid-Decade Congressional Redistricting Violates Article I of the Federal Constitution.

Before looking at the legality of the specific characteristics of the new map, there is a separate constitutional issue – whether state legislatures have the authority under Article I to revise a perfectly lawful congressional districting plan after it has been used

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[7] Implementing Plan 1374C for the 2004 elections also would impose serious federalism costs. As discussed above, under the Texas Constitution, because House Bill 3 did not receive a two-thirds majority vote in each chamber of the Texas Legislature, Plan 1374C cannot take effect until the 91st day after the last day of the special session. *See* Tex. Const. art. III, § 39. By then, under the Texas Election Code, the period for candidate qualification will have closed, and congressional candidates will have qualified for the primary ballot *under Plan 1151C*. The only way to avert that scenario would be for this Court to override Texas's state-constitutional provision and give Plan 1374C immediate effect – thus effectively giving House Bill 3 the two-thirds majority support that it did not earn in the Texas Legislature. In the 1992 senate redistricting case, the district court – affirmed by the Supreme Court – insisted that this Texas constitutional provision be observed, and ordered the State to use the court's plan rather than using a legislatively enacted plan that could not take effect before the election cycle got underway. *See Terrazas*, 789 F. Supp. at 839-45.

in one or more elections and before the next census. Such an unusual action is in tension with the basic structure established by the Constitution for electing Members of the House of Representatives.

The Framers sought to make the House both representative and accountable. Representation was to be promoted by reapportioning seats among the States every ten years based on a decennial census of population, U.S. CONST. art. I, § 2, cl. 3, and by giving States a limited grant of authority to establish the methods for electing their Representatives, *id.* art. I, § 4, cl. 1. Accountability was to be promoted by requiring an election every two years "by the People of the several States," *id.* art. I, § 2, cl. 1. At the Constitutional Convention in 1787, George Mason of Virginia explained that the House of Representatives "'was to be the grand depository of the democratic principle of the Govt.'" 1 The Records of the Federal Convention of 1787, at 48 (Max Farrand ed., rev. ed 1966). Likewise, Madison argued that the "liberties of the people of America" would be best secured "under biennial elections, unalterably fixed by [the] constitution." The Federalist No. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961).

An implicit assumption was that Members would represent the same voters *until* the next census. If they did not, accountability would be undermined because the States could manipulate district boundaries to determine which incumbents would be reelected and which would be defeated, rather than allowing the people to make that decision. Although the Supreme Court has never so held, there is good reason to think that this implicit assumption of the Framers would be accepted by the Court as an enforceable limitation on the States' ability to establish procedures for electing Members of Congress – comparable to the existing Article I requirements that they (1) use districts of equal

population, *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), (2) not include messages on ballots designed to influence the outcome, *see Cook v. Gralike*, 531 U.S. 510, 522-26 (2001), and (3) not seek to prevent reelection of incumbents by imposing term limits, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995).

Here, after the President in 2001 established the number of districts to which each State was entitled based on the 2000 census and the formula mandated by Congress, *see* 2 U.S.C. § 2a(b), the Texas Legislature had constitutional authority to draw a new 32-district map – as well as a constitutional obligation to do so because of the equal-population rule. The Legislature defaulted, leaving this Court "with the 'unwelcome obligation of performing in the legislature's stead.'" *Balderas*, slip op. at 1 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). But after the 2002 elections were held under the Court-ordered map, the State no longer had a duty or a legitimate reason to draw districts again. Absent an intervening census, there can be no need to adjust the number of districts and no reliable, official data upon which to adjust the sizes of the districts. Indeed, once a new redistricting plan is put in place at the beginning of the decade, "States operate under the legal fiction that [for the remainder of the decade] . . . the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2515 n.2 (2003). That legal fiction reflects the countervailing interest in maintaining existing districts for ten years at a time: Article I requires exact population equality at the beginning of the decade but tolerates deviations that develop between censuses because accountability to "the People" would be undermined, rather than improved, by allowing mid-decade changes.

After all, continuous redistricting inherently disrupts the links between incumbent Representatives and their constituents. *See White v. Weiser*, 412 U.S. at 791, 797 (applauding a State's good-faith efforts, when redistricting is mandated by new census results, to "maintain[] existing relationships between incumbent congressmen and their constituents"), *cited favorably in Bush v. Vera*, 517 U.S. at 964-65 (plurality opinion) (holding that maintenance of the unique relationship between a Member of Congress and his constituents is a "legitimate state goal" and a "traditional [districting] principle" in Texas). As Justice Story explained, "a fundamental axiom of republican governments [provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 586 (1833).

If districts were redrawn between every biennial election, this linkage would be cut, as elections would then routinely place incumbent Representatives before voters who had never been represented by them. A Member of Congress who had served his constituents well could be effectively knocked out of office by shifting his district to an overwhelmingly new set of constituents, while an ineffective and unrepresentative Member could be saved by excising from his district his most dissatisfied constituents. The Constitution tolerates such changes when they are the inevitable result of eliminating population disparities in the wake of a new decennial census. But in the middle of the decade, with no intervening census data to justify change, they are nothing but an affront to our democratic process.

The Texas redistricting legislation, of course, was specifically designed to cut the links between incumbents Representatives and their constituents. The true motive behind the bill was hardly disguised: The Republican-controlled Legislature sought to manipulate election outcomes in order to maximize partisan gains. As Congressman DeLay bluntly put it: "I'm the Majority Leader, and we want more seats." Suzanne Gamboa, *DeLay, Texas Dems in Redistricting Fight*, Associated Press, May 7, 2003. A central strategy for achieving that goal was breaking up districts in which Republican-leaning voters had strong relationships with long-standing Democratic incumbents, thus undermining accountability and disregarding the Framers' assumption that such changes would occur only every ten years.

Perhaps not surprisingly, mid-decade redistrictings are unheard of in the modern era. And perhaps equally unsurprisingly, these mid-decade redistrictings have cropped up this year only in States where a political party that lacked unilateral control over the redistricting process in 2001 and 2002 has subsequently gained a vise grip on state government and seeks to entrench its newfound power. If legislatures are allowed to fine-tune their gerrymanders every two years with data from the latest elections, the risk of partisan entrenchment will escalate dramatically.

This case will help decide if redistricting is an endless game played after each election, or whether it will be a once-a-decade activity as the Framers intended. Since *Baker v. Carr*, 369 U.S. 186 (1962), kicked off the "Reapportionment Revolution" in 1962 and *Wesberry v. Sanders*, 376 U.S. 1 (1964), established the strict one-person, one-vote rule for congressional redistricting in 1964, 50 States have gone through 20 biennial election cycles. Yet none has ever shown the audacity exhibited by the Republican

leadership of Texas this year. The United States Supreme Court's willingness to revisit the issue of partisan gerrymandering this Term suggests that these sorts of shenanigans will not be lightly tolerated.

B. The Proposed Map Violates the Voting Rights Act and the Equal Protection Clause.

Plan 1374C also violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth Amendment's Equal Protection Clause by intentionally and significantly decreasing the opportunities for African-American and Hispanic voters to participate in the political process and to elect Representatives of their choice.

Proposed Plan 1374C would devastate the opportunity for African-Americans in Tarrant County (Fort Worth) and southwestern Dallas County to elect their preferred candidates to Congress. Fort Worth contains the third largest concentration of African-Americans in the State of Texas. Currently, the bulk of the black population of Fort Worth and Tarrant County resides in District 24, which bridges Tarrant and Dallas Counties and is represented by Democratic Congressman Martin Frost. District 24 is a majority-minority district: 64.7% of its total population, 59.3% of its voting-age population (VAP), and 50.1% of its citizen voting-age population (CVAP) belong to minority groups. In the precincts constituting current District 24, voting in general elections – both congressional and statewide – is racially polarized, with a majority of Anglos voting Republican and a majority of non-Anglos, including an overwhelming majority of African Americans, voting Democratic. Due to the district's large minority presence, it is reliably Democratic: Since 1998, Democratic statewide candidates have carried the district in 31 of 33 elections. In 2002, Democratic statewide candidates averaged 58.1% of the vote in District 24; that figure included a 59.7% majority for

African-American U.S. Senate candidate Ron Kirk and a 58.1% majority for Hispanic gubernatorial candidate Tony Sanchez.

Because District 24 is so reliably Democratic, and because the vast majority of its African-American primary voters participate in the Democratic primary, voting patterns in those primaries are also important under Section 2 of the Voting Rights Act. Black voters dominate the Democratic-primary electorate in District 24, and precinct-level analysis shows that, in Democratic primaries featuring candidates of more than one race, voting is racially polarized. In a Democratic primary within District 24, the candidate preferred by black voters usually prevails and wins the nomination. For example, Ron Kirk garnered 66.0% of the vote in the 2002 Democratic primary for U.S. Senate, and 74.9% of the vote in the Democratic runoff election, even though he failed to carry the district's Anglo vote either time.

Congressman Frost has represented this district, or its predecessors, since 1978. The African-American community in District 24, which is sufficiently large and politically cohesive to control the nomination and election of candidates, has repeatedly backed Congressman Frost and was largely responsible for his performance in the 2002 elections, when he ran unopposed in the Democratic primary and then received 64.7% of the total vote in the general election. Over the years, Congressman Frost's voting record on the floor of the House has consistently earned ratings from the NAACP's "report cards" averaging at least 90%. Congressman Frost is by all relevant measures the candidate of choice of his African-American constituents.

Proposed Plan 1374C would dismantle District 24 and destroy the opportunity of its minority community – which is more than 421,000 persons strong – to nominate and

elect its preferred Representative to Congress. Tellingly, the Senate and the House each initially rejected a proposal that would have destroyed District 24 because that was widely perceived as violating the Voting Rights Act, but the proposal resurfaced in the conference committee, which contained no minority legislators from the Metroplex. Under the proposed Plan 1374C, current District 24 would be divided among five new districts: District 26 (which is home to Republican Congressman Michael Burgess and, according to the TLC's 2002 index of statewide contests, is 62.4% Republican); District 6 (home to Republican Joe Barton and Democrats Martin Frost and Jim Turner, and 64.1% Republican); District 32 (home to Republican Pete Sessions and 64.3% Republican); District 12 (home to Republican Kay Granger and 63.0% Republican); and District 24 (a 67.6% Republican open seat that contains much of Republican State Representative Kenny Marchant's state-legislative district). Current District 24's African-American population also would be splintered five ways, with the largest piece (including most of Fort Worth's black community) being placed in new District 26 – a district dominated by heavily Anglo suburbs in Denton County.[8]

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[8] Defendants may claim that the destruction of District 24 in Tarrant and Dallas Counties would somehow be offset by the creation of a "new" "black district" in the Houston area. That claim must be rejected. As a matter of law, the individual voting rights of African-Americans and Hispanics in the Metroplex cannot be sacrificed in favor of minority voters hundreds of miles away. *See Shaw v Hunt*, 517 U.S. 899, 917 (1996) ("If a § 2 violation is proved for a particular area, . . . [t]he vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State."). And as a matter of fact, District 24 could be put back together as an effective district for minority voters without in any way affecting district lines in the Houston area. Moreover, the supposedly "new" black district in Houston, proposed District 9, is just the successor of the current District 25, which functions much as District 24 does in the Metroplex – that is, as a district where blacks can nominate and elect their preferred candidates. *See Balderas*, slip op. at 14 (noting that current District 25, with a population that is 52.5% minority, is a "minority district that enhances the elective chances of a minority")

Defendants also might argue that African-Americans in Tarrant and southwestern Dallas Counties could not state a valid Section 2 claim against Plan 1374C because they would constitute less than 50.0% of any remedial district's citizen voting-age population (CVAP). *See Valdespino v Alamo Heights Ind. Sch. Dist.*, 168 F 3d 848, 852-53 (5th Cir. 1999) (requiring Section 2 plaintiffs to show that their minority group could constitute more than 50.0% of the CVAP in a new district), *cert. denied*, 528 U.S. 1114 (2000). But that argument is wrong, for two reasons. *First*, in the Supreme Court's most recent Voting Rights act case, *Georgia v Ashcroft*, 123 S. Ct. 2498 (2003), all nine Justices rejected the bright-line 50.0% rule and

Proposed Plan 1374C's harm to African-American voters would not be confined to Tarrant and Dallas Counties. Nor would the harm be limited to African-American voters. As discussed above, Plan 1374C targets for defeat the Anglo Democratic Representatives from current District 1 (Congressman Sandlin), District 2 (Congressman Turner), District 4 (Congressman Hall), District 9 (Congressman Lampson), District 11 (Congressman Edwards), and District 17 (Congressman Stenholm). All told, they represent well over a million African Americans and Hispanics. As already noted, these six Members of Congress win reelection by assembling a coalition of independent and ticket-splitting Anglo voters with a base of overwhelming support from minority voters. Thus, minority voters in each of these six relatively rural "influence" districts "play a substantial, if not decisive, role in the electoral process" – precisely the kind of role that the Supreme Court recently held to be legally significant under the Voting Rights Act. *Georgia v Ashcroft*, 123 S. Ct. at 2512. And the same is true for Congressman Lloyd Doggett's current District 10, an influence district where Hispanics and blacks together constitute more than 39% of the voting-age population.

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embraced "coalitional districts," in which a minority group that comprises less than half the population is nonetheless sufficiently large and cohesive to nominate and elect its preferred candidates with the assistance of limited crossover voting from the Anglo majority (or from other racial or language minorities). *See id.* at 2511-17; *see also id.* at 2518-22 (Souter, J., dissenting). Under Plan 1151C, District 24 – like Districts 18, 25, and 30 – is a "coalitional district" where African-American voters can nominate and elect their preferred congressional candidates even though they constitute less than half the district's CVAP. Indeed, in each of those four districts in 2002, U.S. Senate candidate Ron Kirk garnered more than 74% of the vote in the Democratic runoff election and then carried the district handily in the November general election. *Second*, because the state Defendants here acted with racially discriminatory intent in drawing and enacting Plan 1374C, they violated the Equal Protection Clause (as well as the Voting Rights Act) and therefore the strict *Valdespino* rule would not apply. *See Garza v County of Los Angeles*, 918 F.2d 763, 769-71 (9th Cir. 1990) (holding that plaintiffs' minority group need not exceed 50.0% of a proposed district's population when they challenge an intentionally discriminatory plan under the Equal Protection Clause), *cert. denied*, 498 U.S. 1028 (1991); *cf Holder v Hall*, 512 U.S. 874, 885 (1994) (remanding the case for consideration of plaintiffs' constitutional claim, even though they had no valid Voting Rights Act claim).

In *Georgia v. Ashcroft*, the Supreme Court explained that, "[i]n assessing the comparative weight of these influence districts, it is important to consider 'the likelihood that [their representatives] would be willing to take the minority's interests into account.'" *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 100 (1986) (O'Connor, J., concurring in the judgment) (interpreting Section 2 of the Voting Rights Act)). Again, turning to the congressional "report cards" issued by the NAACP and the Hispanic Leadership Agenda, there is strong evidence that the seven Democratic Representatives from these districts are taking minority interests very much into account. In the 106th and 107th Congresses, for example, these seven Members consistently scored, on average, approximately 50 points higher than the average Texas Republican Member of Congress in the NAACP Legislative Scorecard and approximately 60 points higher than the average Texas Republican Member on the Legislative Scorecard of the National Hispanic Leadership Agenda (*available at* http://www.lulac.org/NHLA.html). These seven Democratic Members are supported by minority voters on Election Day precisely because they support minority interests when issues of particular concern reach the floor of the House of Representatives.

Under proposed Plan 1374C, the minority communities from the six relatively rural districts would be scattered among and submerged into no fewer than 15 overwhelmingly Republican (and predominantly suburban-dominated) districts, where they would be deprived of any meaningful role in the primary elections (because they would participate largely in Democratic primaries while the ultimate winners would be selected in the Republican primaries) and of any potentially outcome-determinative role in the general elections. Remarkably, fewer than 3% of the million African-Americans

and Hispanics currently residing within these six influence districts would find themselves in a Democratic-leaning district under Plan 1374C.

That minority voters would be effectively shut out of the political process in these new congressional districts is not mere happenstance. Minority senators brought these precise concerns to the attention of the Texas Legislature in September 2003 when the redistricting bill was debated on the Senate floor. But the concerns about the damage being done to minority voters' effectiveness in these predominantly rural districts were cast aside by the Republican majority in the name of partisan politics. Ultimately, *all* the Hispanic and African-American members of the Senate voted against the new plan, as did two Anglo Democrats who represent majority-minority senate districts. In the House, all but two minority legislators voted against the map.

As with the destruction of District 24 in Tarrant and Dallas Counties, another feature of Plan 1374C that violates the Voting Rights Act did not come to light until House Bill 3 was in conference: the evisceration of Hispanic voting strength in District 23, the currently majority-Hispanic district that runs from El Paso to Laredo to San Antonio and is represented by Republican Congressman Henry Bonilla. Under the Court-ordered Plan 1151C, District 23 is majority-Hispanic by every measure – total population, voting-age population (VAP), citizen voting-age population (CVAP), and the population of registered voters. Evidence adduced at this Court's fall 2001 trial, from experts representing virtually every party to the dispute, consistently showed that Congressman Bonilla survives in this district by attracting the overwhelming support of its Anglo electorate, plus a sizable minority of Hispanic voters, some of whom split their tickets to support him. But as Hispanic registration and turnout has grown in District 23,

it has become increasingly Democratic. In November 2002, Congressman Bonilla's Hispanic Democratic challenger held the incumbent to less than 52% of the total vote, as 14 of the 16 Democratic statewide candidates carried the district.

To bolster Congressman Bonilla's chances of reelection in 2004 and beyond, the conference committee redrew his district to replace the eastern half of Webb County (which is 96.1% Hispanic and voted 86.5% Democratic in the 2002 statewide contests)[9] with northwestern suburbs and exurbs of San Antonio, including Kendall, Bandera, and Kerr Counties, which are heavily Anglo and overwhelmingly Republican. This swap would drop the Hispanic percentage of the citizen voting-age population (CVAP) from 57.5% to 46.0%, and the percentage of registered voters with Spanish surnames likewise would fall from 55.3% to 44.0%. The district's Republican percentage would rise by 9 points. In every one of the 33 statewide contests since 1998, Republican candidates have carried the proposed District 23.

Because a majority of the Hispanic voters in proposed District 23 prefer Democratic candidates for Congress, the partisan shift effectuated by Plan 1374C would destroy any realistic opportunity to elect their preferred Representative to Congress. More than 300,000 Hispanics reside in both the current and the proposed District 23. Proposed Plan 1374C would eviscerate their voting strength, in violation of Section 2 of the Voting Rights Act.

Defendants will likely contend that this loss of Hispanic voting strength would somehow be "offset" by the creation of a new Hispanic District 25. As an initial matter,

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[9] By contrast with Plan 1374C, which would slice both the city of Laredo and Webb County right down the middle, the Court-drawn Plan 1151C kept both "wholly intact in District 23." *Balderas*, slip op at 16 In the 2002 general election, Congressman Bonilla garnered less than 16% of the vote in Webb County

that argument will give little solace to the 300,000 Hispanics in District 23 who would no longer have any hope of electing their preferred candidate to Congress. *See Shaw v Hunt*, 517 U.S. 899, 917 (1996) (holding that abridgement of the federally guaranteed voting rights of minority citizens in one part of the State cannot be offset by creating minority districts in a different part of the State). Furthermore, the proposed District 25 raises serious legal concerns of its own. First, as discussed below, District 25 would stretch 300 miles, from McAllen all the way up to Austin, to connect two far-flung pockets of minority strength – in violation of the "*Shaw* doctrine" prohibiting racial gerrymanders. Second, squeezing majority-Hispanic District 25 into South Texas, while leaving 300,000 Hispanics trapped in the new majority-Anglo CVAP District 23, would make each of the South Texas districts less Hispanic and more Republican. *Cf. Balderas*, slip op. at 12, 14-15. District 28 (represented by Democratic Congressman Ciro Rodriguez) would surrender to the new District 25 territory that is almost 94% Hispanic and 82% Democratic. District 15 (represented by Democratic Congressman Ruben Hinojosa) would be squeezed thinner and would lose almost three-fourths of McAllen,[10] and therefore would have to extend much further north, taking in four-and-a-half heavily Republican counties currently represented by Republican Congressman Ron Paul. To ameliorate that effect, District 15 would pull Hispanic Democrats from Cameron County, weakening the Democratic performance in District 27 (represented by Democratic Congressman Solomon Ortiz). And all this needless disruption to the South Texas electorate would be triggered by the Legislature's desire to transform Congressman

[10] *Cf Balderas*, slip op. at 16 n.33 ("We endeavored to and did respect the municipal boundaries of McAllen, a major population center of Hidalgo County.").

Bonilla's District 23 into a majority-Anglo CVAP Republican district while trapping 300,000 Hispanics there to serve as powerless "filler people."[11]

C. The Proposed Map Is an Unconstitutional Racial Gerrymander.

As already alluded to, proposed Districts 25 and 15 raise serious racial-gerrymandering concerns under the "*Shaw* doctrine." *See Shaw v. Reno*, 509 U.S. 630 (1993). On both measures of compactness used by the TLC, these two districts rank at or near the very bottom. Both districts would be more than 300 miles long and at some points less than 10 miles wide. District 25 would run from McAllen to Austin, and District 15, immediately to its east, would run in parallel, from Harlingen to Bastrop County. Together, the districts resemble two string beans lying side by side. Of course, by simply slicing the rectangular two-district area into a northern District 25 and a southern District 15 (rather than an eastern District 15 and a western District 25) the districts could have been made half as long and twice as wide and hence considerably more compact. But then the new, northern District 25 would not have been majority-Hispanic and could not have been portrayed as an "offset" to the obliteration of Hispanic electoral opportunity in Congressman Bonilla's District 23.

Proposed District 25 is particularly disturbing in another way. Demographically, it is a 300-mile-long "barbell," with nearly all its population – and especially its Hispanic population – at the two "ends" of the district and an elongated "middle" that does little

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[11] Stretching the Valley districts from the border all the way to Travis or Bastrop County would significantly increase the cost of campaigning in these districts. Candidates would have to communicate in more media markets, voting blocks would be more segmented, and travel would be harder and more expensive This increased cost, combined with reduced Democratic performance, would give Republican candidates a significant new advantage that they lack in the current configuration. Even in proposed District 25, which would be safely Democratic and where the key contest would therefore be in the Democratic primary, the cost of communicating simultaneously in the expensive Austin media market and the border media market would likely benefit an Anglo Democrat with access to resources rather than a Hispanic newcomer.

but connect the two ends to ensure technical compliance with the "contiguity requirement." *Balderas*, slip op. at 7. Travis County, with 253,000 people at the northern end, and Hidalgo and Starr Counties, with 301,000 at the southern end, together account for 85% of the district's total population and 89% of its minority population. In between lie six rural counties that serve as a land bridge connecting Austin to the Rio Grande. That is a paradigmatic example of an unconstitutional racial gerrymander. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995) (invalidating, for predominantly racial intent, a majority-black district that used "narrow land bridges to incorporate . . . outlying appendages containing nearly 80% of the district's total black population").[12]

D. The Proposed Map Is an Unconstitutional Partisan Gerrymander.

Even if it had been enacted in 2001, the new map would have been illegal because it is a severe partisan gerrymander that violates the Fourteenth Amendment's Equal Protection Clause, as well as Article I, Sections 2 and 4, of the Federal Constitution. As this Court explained two years ago, partisan gerrymandering "is much a bloodfeud, in which revenge is exacted by the majority against its rival." *Balderas*, slip op. at 10. That description captures the very essence of Plan 1374C and the warped process that led to its enactment. In this Court's words, the Legislature's gerrymander is "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *Id.*

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[12] Racial gerrymandering in Plan 1374C is not confined to the South Texas-based districts For example, apparently the Legislature's sole rationale for redrawing District 30 (which is already an effective district for African-American voters in Dallas County) was to push the district's black percentage of the citizen voting-age population (CVAP) just barely above the artificial threshold of 50%. *See Bush v. Vera*, 517 U.S. at 969-72 (plurality opinion) (invalidating the predecessor of District 30 as an unconstitutional racial gerrymander because the Legislature strove to push its black percentage above 50% without regard for traditional redistricting principles).

Plan 1374C is designed to entrench at least a 22-to-10 Republican supermajority in Texas's congressional delegation – and to insulate that majority from any foreseeable swings in public opinion or voting behavior. The map "packs" as many Democratic voters as possible into just 10 of the State's 32 districts, and spreads the State's Republican voters efficiently across the other 22 districts. Indeed, *even if Democrats attracted an outright majority of the congressional ballots cast across the entire State*, they would likely win only 10 or 11 seats (out of 32). In other words, under Plan 1374C, the party preferred by a majority of voters could get only a third of the seats, while the less popular party gets two-thirds. Any districting plan that so intentionally and severely thwarts majority rule violates the Constitution.

The precise legal standard applicable to claims of partisan gerrymandering is currently in flux, as the U.S. Supreme Court – on June 27, 2003, in the midst of the Texas redistricting controversy – noted probable jurisdiction in *Vieth v. Jubelirer*, 123 S. Ct. 2652 (2003), a case challenging Pennsylvania's 2002 congressional redistricting plan as an unconstitutional partisan gerrymander under both Article I and the Equal Protection Clause. Oral argument in *Vieth v. Jubelirer* is set for December 10, 2003, so the Court will likely hand down its opinion sometime in early 2004. (A complete set of Supreme Court briefs filed by all parties in *Vieth* can be downloaded from http://www.jenner.com/news/news.asp#772.)

In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court recognized that partisan gerrymandering that thwarts majority rule is an affront to basic democratic values and is unconstitutional under the Equal Protection Clause. *Id.* at 126 n.9 (majority opinion); *id.* at 133, 135 (plurality opinion). Two lines of constitutional cases support

Bandemer. *First*, in the one-person, one-vote cases, the Court held that the basic democratic principles on which this Nation was founded do not permit legislators to draw unequally populated districts that make the votes cast by some citizens substantially more valuable than those cast by others. The gerrymandering of equally populated districts to favor one political party at the expense of another is just another way to inflict the same injury. *Second*, the Court's First Amendment jurisprudence prohibiting viewpoint-based discrimination is largely premised on the need to protect our democracy from indirect distortion through governmental intrusion into the free marketplace of ideas. The Equal Protection Clause is no less implicated when government accomplishes a comparable distortion directly through gerrymandering.

In addition, Article I of the Constitution limits partisan gerrymandering of congressional districts. As already discussed, Section 2 of that Article mandates that Representatives be elected directly "by the People of the several States." Section 4's Elections Clause merely grants state legislatures the power to establish *procedural* regulations for holding those elections. Because the Framers intended the House of Representatives to be a highly responsive "mirror" of popular will, the States' constitutional role is not a "source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc.*, 514 U.S. at 833-34. When a State sets out to draw congressional districts that have the effect of preventing one party from winning a majority of districts even if it wins a majority of votes, it usurps power that Article I, Section 2 reserves to "the People of the several States" and transgresses the limits of its authority under Article I, Section 4. Indeed, because the Framers intended the House to be the most representative and

responsive body in the federal government, courts should scrutinize partisan gerrymandering in the congressional context with particular strictness – just as courts demand a much greater degree of population equality for congressional districts than for other legislative districts.

The appellants in *Vieth* argue that plaintiffs can demonstrate unconstitutional partisan gerrymandering by making two showings. *First*, plaintiffs must show that the mapmakers acted with a predominant *intent* to achieve partisan advantage. That can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v Reno*, 509 U.S. 630 (1993). *Second*, sufficient partisan *effects* are established if (1) the plaintiffs show that the districts systematically "pack" and "crack" the rival party's voters, and (2) the court's examination of the "totality of circumstances" confirms that the plan could thwart that party's ability to translate a majority of votes into a majority of seats.

If the Supreme Court adopts anything even approaching that standard, Plan 1374C would fail the test. First, no one can seriously contest that the predominant motive behind Plan 1374C was to achieve – indeed, to maximize – the Republicans' partisan advantage. Its drafters have candidly admitted as much.

Second, Plan 1374C's districts systematically "pack" and "crack" Texas's Democratic voters. "Packing" and "cracking" are precisely the same concepts found in Voting Rights Act cases: Whenever an identifiable group is unevenly distributed across a State, its voting strength can be diluted either by over-concentrating, or "packing," its members into the fewest possible districts and thus effectively wasting votes that might

have had a meaningful impact in neighboring districts, or by fragmenting, or "cracking," concentrations of the group's members and dispersing them into districts where they will constitute ineffective minorities of the electorate. *See Thornburg v. Gingles*, 478 U.S. at 46 n.11; 28 C.F.R. § 51.59(c)-(d). In assessing whether a districting plan systematically "packs" and "cracks" one party's voters, it is useful to look at election returns from recent statewide contests, such as races for U.S. Senator, Governor, Lieutenant Governor, and so forth. Using the average of the results from the 16 statewide contests held in November 2002 – as reported by the nonpartisan Texas Legislative Council (TLC) – Plan 1374C has 22 districts that are between 56.8% and 70.2% Republican, and 10 districts that are between 22.7% and 44.4% Republican. On average, the 22 Republican districts are 7.0 points more Republican than the State as a whole, making them perfectly safe for Republican candidates. But the 10 Democratic districts, on average, are 23.1 points more Democratic than the State as a whole, because the mapmakers "packed" as many Democratic voters as possible into these 10 districts.

Perhaps what is most amazing about the way Plan 1374C redistributes Texas's Republican and Democratic voters is the complete eradication of competitive districts where candidates are forced to appeal to centrist, independent, ticket-splitting voters. Proposed Plan 1374C does not have a single district in the competitive range between 44.4% and 56.8% Republican. All 32 districts have been divvied up between the parties, with the Republicans getting 22, Democrats getting 10, and independent voters and ticket-splitters exercising little if any influence anywhere. "'The final result seems not one in which the people select their representatives, but in which the representatives have

selected the people.'" *Bush v. Vera*, 517 U.S. at 963 (plurality opinion) (citation omitted).

Beyond packing Democrats into just 10 districts, other factors further confirm that Plan 1374C would consign Democrats to minority status in the congressional delegation for the remainder of the decade, regardless of their potential success with Texas's voters, while ensuring Republicans a two-to-one advantage in seats, even if they slide into minority status in the electorate. One key factor here is the differential "pairing" of incumbents in a single district. Plan 1374C would create three pairings and one "tripling" – and every one of them would operate to the Republicans' advantage. None of the pairings would involve two Republican incumbents. One, in proposed District 2, would involve two Democratic incumbents – Congressman Nick Lampson of current District 9 and Congressman Gene Green of current District 29.[13] Proposed District 6 would stretch all the way from Fort Worth down to Trinity County to "triple" two Democrats (Martin Frost and Jim Turner) with one Republican (Joe Barton) in a district that contains almost two-thirds of Congressman Barton's current constituents and voted 64.1% Republican in the 2002 statewide contests. The other two pairings would pit one Democrat against one Republican: Republican John Culberson and Democrat Chris Bell in new District 7; and Republican Randy Neugebauer and Democrat Charlie Stenholm in new District 19. But by no means would they be "bipartisan" pairings in the practical sense: Based on the average of the 16 statewide contests from November 2002, the

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[13] This pairing was created by placing 1.1% of Congressman Green's current district (including his home) in the new District 2. This means he would have to stay in a district where he is paired and has almost no relationship with the voters or move into the new District 29 where the vast bulk of his current constituents live. Even if Congressman Green would run in proposed District 29 and Congressman Lampson would win the Democratic nomination in the proposed District 2, the latter district is only 39 4% Democratic (according to the TLC's average of the 2002 statewide contests), and most of its constituents would be new to Congressman Lampson, thus virtually ensuring his defeat.

Republican percentages in these two districts are 70.2% and 69.0%, respectively. And in both districts, constituents of the Republican incumbent would far outnumber constituents of the Democratic incumbent.

Even aside from pairings, the Republican incumbents would be given another advantage because the "cores" of their current districts are maintained to a much greater degree than are the cores of the Democratic incumbents' districts. On average, 29.1% of the constituents in the Republican incumbents' home districts would be unfamiliar to them, as compared with 53.7% in the Democratic incumbents' home districts; so Democrats would face nearly twice as many new voters. Thus, Plan 1374C would preserve the Republicans' incumbency advantages far more than it would the Democrats'.

The Texas Legislature's power to redraw congressional districts flows solely from the Federal Constitution's Elections Clause. As the Supreme Court has repeatedly held, that Clause does not empower state legislatures "to dictate electoral outcomes [or] to favor or disfavor a class of candidates." *U.S. Term Limits*, 514 U.S. at 833-34; *accord Cook v. Gralike*, 531 U.S. at 523, 526. But that is precisely what Plan 1374C would do. Because a fair and perfectly legal plan is already in effect, and because of the likelihood that Plan 1374C could be invalidated after the Supreme Court rules in *Vieth v. Jubelirer*, this Court should bar implementation of Plan 1374C, at least until *Vieth* is decided. Judicial economy would be ill-served by allowing the State of Texas to modify the court injunction now, only to revisit its substantive sufficiency in the wake of *Vieth* early next year, when the 2004 election cycle will be in full swing and candidates will have qualified and likely run in party primaries.

IV. The Court Should Leave the Current Plan in Place for 2004 and Address the New Proposed Plan in an Orderly Way.

The Defendants' decision to enact a new and legally dubious redistricting plan less than two months before the commencement of candidate filing puts the Court in a difficult position, with only two real choices. *First*, the Court could reasonably determine that there is not sufficient time to consider this year all of the issues relating to the decision whether to allow Defendants to replace the current map with their new alternative. Under that scenario, the Court would establish a schedule for interventions, submission of all legal challenges, discovery, dispositive motions, and a trial, while requiring the State to use the current remedial Plan 1151C in 2004. *Second*, the Court could attempt to compress that entire process into a few weeks in order to be able to decide quickly whether the Legislature had the constitutional authority to enact a new plan at this point in the decade, whether the new map is lawful and, if so, whether the equities justify the disruptions that will be caused by replacing one legal map with another.

In deciding whether to go into an accelerated litigation mode or to set a less rushed schedule while keeping the current map in place for 2004, the Court should consider not only the logistics of resolving the issues in the next few weeks – which are daunting – but the *Vieth v. Jubelirer* factor. As we have discussed, the *Vieth* case may well change the law of partisan gerrymandering next spring. That means that if the Court were to allow the new map to take effect for 2004, there is a very real prospect that map would later be found to be an unconstitutional partisan gerrymander under the new standards set in *Vieth*. At that point, voters would face a fourth new map in four elections, and the Democratic incumbents thrown out of office in 2004 as a result of

being unconstitutionally targeted would be irreparably harmed, as would their constituents. That prospect, in our view, ought to be avoided at all costs.

In any event, the one thing that the Court cannot do is to allow the new map to go into effect before it is tested in court. Given the substantiality of the Mayfield Plaintiffs' legal challenges, it would be extraordinarily unfair for the Court to allow the Defendants to gain the advantage of defeating a large number of incumbent Representatives and *then* review the new map to see if it is illegal.

For all of these reasons, the most sensible option, in our view, is to leave the current Court-drawn Plan 1151C in place for this election cycle. But Plaintiffs stand ready to make their case on the merits during October and November if that is the Court's preferred option.

WHEREFORE, the Mayfield Plaintiffs pray that this Court will enter an Order barring Defendants from implementing Plan 1374C unless and until the Court's injunction is changed to allow it, requiring Defendants to continue using the current Court-ordered congressional Plan 1151C in the 2004 elections, and establishing an orderly schedule for considering all of the factors that go into whether a modification of the injunction should be allowed for the 2006 elections

Respectfully submitted,

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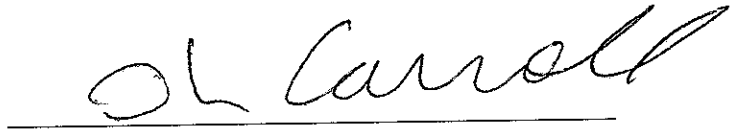
Certificate of Conference

This is to advise that opposing counsel are opposed to the filing of this motion.

Otis Carroll

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been forwarded, via facsimile and/or regular mail with proper postage affixed, to all counsel of record in this case this the 12 day of October, 2003.



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